United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

ORIGINAL

76-1194

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

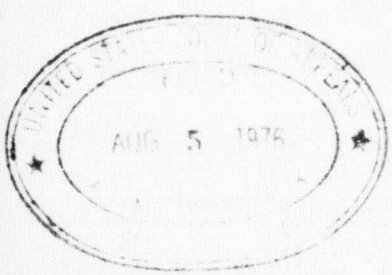
PHILIP RASTELLI, et al.,

Defendants,

JOHN JOSEPH SUTTER, Esq.,

Defendant-Appellant.

BRIEF ON BEHALF OF *AMICUS CURIAE*, THE SUFFOLK COUNTY CRIMINAL BAR ASSOCIATION



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Preliminary Statement

This is an appeal by John Sutter, from an order entered in the United States District Court for the Eastern District of New York on March 30, 1976, by the Honorable Thomas J. Platt, District Court Judge, imposing a fine in the sum of $500.00 per day for a total sum of $1,500.00 for the delay the appellant allegedly caused in the commencement of the above captioned trial. The fine was paid.

Questions Presented

1. Whether John Sutter's failure to appear in Federal District Court because he accepted and became engaged in a case in Nassau County that he believed would last only two weeks amounts to a criminal contempt?

2. Whether Mr. Sutter was improperly punished summarily, and should have been granted a trial or hearing first upon notice?

3. Whether Judge Platt should have disqualified himself from trying or hearing, and sitting in judgment of Counsel?

POINT I

Counsel's failure to appear on the date scheduled was not a contempt.

According to *Carbon Fuel Co.* v. *United Mineworkers of America,* 517 F.2d 1348, 1349 (4th Cir., 1975):

> ". . . criminal contempt is punitive in nature, is intended to vindicate the authority of the Court and cannot be purged by any act of the contemnor. . . . It is 'unconditional since it penalizes yesterday's defiance rather than seeking to coerce tomorrow's compliance. It cannot be ended or shortened by any act of the defendant."

A conviction for criminal contempt, like other proceedings of a criminal nature must include a finding of either general or a specific intent on the part of the contemnor to commit the offense. A finding of recklessness on the part of the attorney may sometimes furnish the inference that the requisite intent was present. Thus Mr. Sutter's acceptance of the Charmont case in the good faith belief that the trial would end in two weeks (this testimony is not controverted) would be relevant to show that Sutter lacked the intent needed to sustain his contempt conviction.

As was stated in *United States* v. *Williams,* 509 F.2d 949, 960 (2d Cir., 1975):

> "To warrant a conviction in criminal contempt, the contemnor's conduct must constitute misbehavior

> which rises to the level of an obstruction of and an imminent threat to the administration of justice, and it must be accompanied by the intention on the part of the contemnor to obstruct, disrupt or interfere with the administration of justice."

The cases researched do not disclose whether the attorney's absence or lateness is being charged under § 401 (1) or § 401 (3) but all the cases seem to require a finding of intent or recklessness. It appears, however, that the cases found deal with absence or lateness of an attorney as a possible violation of § 401 (1) since the language often considers whether the "misbehavior" was in the "presence of the court." The type of "disobedience" that gives rise to a § 401 (3) situation is that situation where, for example, a witness refuses in open court to answer the questions put to him on the witness stand after the court has told him he must answer. *United States* v. *Martin*, 525 F2d 703 (2d Cir. 1975) (holding that to convict under § 401 (3) there is no need to find obstruction of justice). Thus § 401 (3) does not seem to be involved in the present case. Parenthetically, it is noted that Sutter, as a private attorney, is not covered under § 401 (2). *Cammer* v. *United States*, 350 U.S. 399 (1956).

It would appear that the Second Circuit does require a finding of intent to obstruct (*United States* v. *Williams*, supra). The requirements for a conviction under § 401 (1) are fourfold: 1. The conduct must amount to misbehavior. 2. The misbehavior must amount to an obstruction of justice. 3. The conduct in question must be in the presence of the court or so near the court that it obstructs the administration of justice. 4. There must be an intent to obstruct. (*United States* v. *Seale*, 461 F.2d 345 (7th Cir. 1972).) The four *Seale* requirements appear to have support in cases decided by the Supreme Court; and, it is submitted, each *Seale* requirement must be found by proof beyond a reasonable doubt.

There appear to be no Second Circuit cases that have considered the issue of whether absence or lateness of an attorney from a courtroom amounts to a contempt. However, cases from other circuits indicate that such absence is not a contempt when the requisite intent is lacking on the part of the attorney.

In *Sykes* v. *United States*, 444 F.2d 928 (U.S. Cir. Ct. D.C. 1971), the petitioner, an attorney of record in a criminal case requested and obtained a continuance of the trial until May 8, 1969. The attorney failed to appear on May 8 and the trial court found him in contempt. It appeared that the attorney had simply forgotten about the May 8 appearance; although he had noted the date in his notebook, he chose to rely on his memory. It was not until 2 PM on May 8 that the attorney stopped at his office and learned of the May 8 date. He had been under the erroneous impression that the trial dates continuance was May 15, as both dates had been discussed. The attorney had not previously been late or absent from court on the days he was scheduled to appear.

The Court of Appeals stated that, "An essential element of that offense (criminal contempt) is an intent, either specific or general to commit it." (444 F.2d at 930.) By definition, a contempt is a *wilful* disregard or disobedience of a public authority." (emphasis by the court.) The *Sykes* court also said that the requisite intent to support a criminal contempt conviction can be inferred if "a lawyer's conduct discloses a reckless disregard for his professional duty," (444 F.2d at 930) and the court further stated:

> "On the contrary, it is clear from his unchallenged explanation that his failure to appear was not by design but resulted from a lapse of memory, preoccupation with another case and confusion as to dates. There were no unusual circumstances justifying a conclusion that his conduct was reckless." (444 F.2d at 930.)

In a later case, *In re Niblack*, 476 F.2d 430 (U.S. Ct. of Appeals D. C. 1973), an attorney's contempt conviction was affirmed when the attorney appeared for a scheduled hearing an hour and fifty minutes late. The *Niblack* case is distinguishable from *Sykes*, however, because in *Niblack* the attorney was habitually late to court and had been repeatedly warned about his lateness.

In *In re Farquhar*, 492 F.2d 561 (U. S. Ct. of Appeals D. C. 1973), the attorney returned eight minutes late from a recess. The attorney was late because he was in another part in the same courthouse attending a bond hearing. The trial court found the attorney in contempt. The attorney explained his conduct by saying that the judge's clerk in Case 2 told him not to leave as his case was first on the calendar. As the attorney was about to return to Case 1, his hearing was called. After the judge in the bond hearing case was informed that the attorney was actually engaged in trial, the judge told him to stay as his hearing could be called first. His hearing was called, lasted ten minutes, and the attorney immediately returned to the trial part.

Again the Court of Appeals reversed the trial judge since the attorney's conduct simply did not rise to the level of recklessness needed for contempt. The *Farquhar* court stated at 492 F.2d at 564:

> "Though the appellant (Farquhar) is not blameless for the creation of this conflict and might have judiciously foreseen the possibility for an impasse, his conduct was not 'contumacious', *Gates*, 478 F2d 998; or in 'reckless and wilful disregard of the court's order', *Niblack*, 476 F.2d 930; nor did it disclose '(a reckless) disregard for his professional duty or that he intended any disrespect for the court' *Sykes*, 444 F.2d at 930."

In *United States* v. *Delahanty*, 488 F.2d 396 (6th Cir. 1973) the Court of Appeals found that the facts did not

support a finding of intent necessary to sustain a criminal contempt. Delahanty and Tucker, two attorneys from out of town were to appear in the Louisville Federal District Court at 10:00 A.M. Tucker had no intention of appearing in the Louisville court as he had "other matters scheduled" and Tucker designated Delahanty to act for him. Due to Delahanty's unfamiliarity with Louisville he arrived at 10:10 A.M. At 10 A.M. the Court rescheduled the case for 1:00 P.M. and fined each attorney $150.00. The Court of Appeals said that the appellants' conduct did not display either a reckless disregard of professional duty or evince disrespect for the Court.

Additionally, the *Delahanty* case is similar to the present case in that the trial courts in both cases dealt with the matter of the attorneys' absence summarily. In *Delahanty*, the trial judge fined the appellants at 10:00 A.M. and *then* held a hearing at 1:00 P.M. saying, "Judge Tucker, I will let you put whatever you want to in the record. Gentleman, the contempt fine is going to stay." (488 F.2d at 399.) The Court of Appeals noted that while the absence was obvious to the trial court, the reasons for the absence were not obvious and therefore summary treatment by the court was not warranted. Similarly, Judge Platt imposed a summary fine of $1,000.00 a day on Mr. Sutter even before hearing what Mr. Sutter had to say (March 29 transcript page 59a).

POINT II

Counsel should have been granted a hearing or trial upon notice and not summarily convicted and fined.

Under Rule 42a, the only contempt that may be punished summarily are those occurring in the actual presence of the court. All others must be prosecuted upon notice and hearing under Rule 42b.

The first problem is whether Judge Platt had in fact punished Mr. Sutter summarily. Judge Platt on March 29 immediately fined Mr. Sutter $1,000.00 a day without Mr. Sutter being present. After hearing Mr. Sutter in court, the fine was reduced to $500.00 per day. It would appear that even Mr. Moffat, Mr. Sutter's partner and attorney, on March 30th, did not believe Mr. Sutter had been held in contempt on March 29th and requested a hearing on March 30th. (March 30 transcript, page 92a). However, it appears from a reading of the March 29th transcript that Mr. Sutter was actually being fined summarily $1,000.00 a day and that he would not be able to do much to change Judge Platt's mind (March 29, page 43a). Even Mr. Moffat got this impression initially following the events of March 29. (March 30 transcript, page 92a).

It is possible that Judge Platt could have cured the summary contempt conviction by the March 30th appearance of Mr. Sutter. (*In re Allis*, 531 F.2d 1391 (9th Cir. 1976).) However, Judge Platt never at any time, on March 29th or March 30th, withdrew the original $1,000.00 a day fine during the time he permitted Mr. Sutter to speak. In *United States* v. *Marshall*, 423 F.2d 1130 (5th Cir. 1970), the District court had imposed a summary fine but later withdrew it and held a hearing before imposing a new fine. Mr. Sutter, however, did not appear on March 30th for an impartial hearing, but in effect appeared in mitigation of sentence.

In re United Corporation, 166 F Supp. 343 (D. Del., 1958), noted that the notice should clearly state the underlying facts of the contempt. Rule 42B adds further requirements, such as describing the acts as a criminal contempt; giving notice in open court in the defendant's presence, or via show cause order on order of arrest. What Judge Platt did was to give the underlying facts on March 29th, impose a "contingent" $1,000.00 fine for "failure to appear in accordance with the mandate of this Court." (record, page 66a.)

In no way did Judge Platt comply with 42B. The closest he came to calling Sutter's actions contemptuous was the reference to "failure to appear, etc." No show cause or arrest order was issued. Instead, Mr. Sutter was extended the chance to explain himself, after imposition (albeit "contingent") of a fine.

POINT III

The presiding judge should have disqualified himself.

It is obvious from a reading of the transcripts that Judge Platt was very upset by the failure of the Rastelli trial to proceed on March 29. As an example of this, the March 30, 1976 transcript (e.g., pages 16a, 19a, 20a, 87a) is replete with references by Judge Platt to his trial calendar and his preoccupation with the Rastelli case as being one of his longest cases on the calendar. However, no federal cases have been found which require a judge, upset because his calendar is rearranged by an attorney's failure to appear, should, for that reason, disqualify himself from adjudging the attorney's contempt.

Taylor v. *Hayes*, 418 U. S. 88, 95 S. Ct. 2697 (1974) indicates that when marked personal feelings are present on the part of lawyer and judge, the judge should disqualify himself. In *Taylor*, the attack was made on the person of the judge. In the present case however, Mr. Sutter was not physically in the courtroom; he made no personal attacks upon Judge Platt. In *Taylor*, the Supreme Court said that the attorney was entitled to a finding of contempt by a dispassionate judge. The *Taylor* opinion makes clear that the critical factor in determining if the judge was dispassionate to make a fair finding of contempt is the judge's responses to the lawyer's misbehavior. (95 S. Ct. at 2705 n. 10.)

However, in *State ex rel. Wendt* v. *Journey*, 492 S. W. 2d 861 (Missouri Ct. of Appeals, St. Louis District 1973),

the Missouri appellate court found that the trial judge should have disqualified himself. The attorney failed to appear at a trial scheduled to being Dec. 2, 1971. The trial court held a hearing on Dec. 2 and found that cause existed to hold him in contempt and issued a show cause order returnable Dec. 18, 1971. The attorney was fined $400 and given 15 days in jail. The Missouri appellate court said that the trial judge did not seem to be able to impartially decide if the attorney's absence was a disrespect to the court, and accordingly determined that his rights of due process were denied. In reaching its conclusion, the court replied on *In re Lamson*, 468 F. 2d 551 (1st Cir. 1972); and went on to say:

> "Much like intent, the judge's attitude in this respect may not be readily discernible and the judge may be an unwilling prisoner of his own preconceived notion of what is or is not disrespectful." (492 S.W. 2d at 864.)

CONCLUSION

The order of the District Court imposing a fine for contempt should be reversed and the fine remitted.

Respectfully,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Helen D'Esposito , being duly sworn, deposes and says thatshe is over the age of 18 years, is not a party to the action, and resides at 28 Ridge Road, Albertson, New York 11507
That on July 27, 1976 , she served two copies of the Brief

on

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by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Helen D'Esposito

Sworn to before me this
27th day of July , 1976

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932360
Qualified in Nassau County
Commission Expires March 30, 1977